

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

MARION CURTIS CASSIDY,

Plaintiff,

v.

CAROLYN W. COLVIN, Acting
Commissioner of the Social Security
Administration,

Defendant.

CASE NO. 13-cv-05164 RBL

REPORT AND
RECOMMENDATION ON
PLAINTIFF'S COMPLAINT

Noting Date: March 7, 2014

This matter has been referred to United States Magistrate Judge J. Richard
Creatura pursuant to 28 U.S.C. § 636(b)(1) and Local Magistrate Judge Rule MJR
4(a)(4), and as authorized by *Mathews, Secretary of H.E.W. v. Weber*, 423 U.S. 261,
271-72 (1976). This matter has been fully briefed (*see* ECF Nos. 17, 18, 19).

After considering and reviewing the record, the Court finds that the ALJ
committed harmful error in his review of the medical opinion evidence, failing to provide
specific and legitimate reasons for his failure to credit fully opinions from examining

1 doctor, Dr. Michael K. Friedman, D.O. He also erred in his review of the opinion from
2 Dr. Jennifer James, M.D.

3 For these reasons and based on the relevant record, the Court concludes that this
4 matter should be reversed and remanded pursuant to sentence four of 42 U.S.C. § 405(g)
5 for further administrative consideration.

6 BACKGROUND

7 Plaintiff, MARION CURTIS CASSIDY, was born in 1964 and was 38 years old
8 on the alleged date of disability onset of September 3, 2003 (*see* Tr. 221). Plaintiff
9 completed 10th grade and later received his GED (Tr. 60). Plaintiff has past relevant
10 work as a groundskeeper and cook helper (Tr. 85-86). Plaintiff claims he stopped
11 working because of his medical conditions (Tr. 246).
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13 “Through the date last insured, the claimant had the following severe impairments:
14 herniated cervical disc C5-C6 status post fusion, right shoulder sprain, status post Arnold-
15 Chiari type I malformation and decompressive surgery, left lumbar radiculopathy,
16 depression, anxiety, and pain disorder (20 CFR § 404.1520(c))” (Tr. 30).

17 At the time of the hearing, plaintiff was living with his girlfriend of 23 years and
18 7-year-old son (Tr. 61).

19 PROCEDURAL HISTORY

20 Plaintiff protectively filed an application for disability insurance (“DIB”) benefits
21 pursuant to 42 U.S.C. § 423 (Title II) and Supplemental Security Income (“SSI”) benefits
22 pursuant to 42 U.S.C. § 1382(a) (Title XVI) of the Social Security Act on October 22,
23 2010 (*see* Tr. 221-31, 242). Plaintiff’s SSI claim was denied due to excess resources and
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1 plaintiff did not appeal the financial denial within 60 days, ending his SSI claim (Tr. 142-
2 51).

3 Plaintiff's DIB application was denied initially on March 2, 2011 (Tr. 104-127)
4 and following reconsideration on March 23, 2011 (Tr. 128-139). Plaintiff's requested
5 hearing was held before Administrative Law Judge David Johnson ("the ALJ") on May
6 17, 2012 (*see* Tr. 50-103). On June 4, 2012, the ALJ issued a written decision in which
7 the ALJ concluded that plaintiff was not disabled pursuant to the Social Security Act (*see*
8 Tr.25-49).

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10 On February 4, 2013, the Appeals Council denied plaintiff's request for review,
11 making the written decision by the ALJ the final agency decision subject to judicial
12 review (Tr. 1-7). *See* 20 C.F.R. § 404.981. Plaintiff filed a complaint in this Court
13 seeking judicial review of the ALJ's written decision in March of 2013 (*see* ECF Nos.
14 1,3). Defendant filed the sealed administrative record regarding this matter ("Tr.") on
15 May 20, 2013 (*see* ECF Nos. 12, 13).

16 Plaintiff raises the following issues: (1) Whether or not the ALJ properly
17 evaluated the medical source opinions; (2) Whether or not the ALJ properly found that
18 plaintiff's testimony and statements were not entirely credible; and (3) Whether or not the
19 ALJ's medical and credibility findings supported the ALJ's residual functional capacity
20 ("RFC") assessment and vocational analysis (*see* ECF No. 18, pp. 1-2, *citing* ECF No.
21 17, pp. 3-11).
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STANDARD OF REVIEW

Plaintiff bears the burden of proving disability within the meaning of the Social Security Act (hereinafter “the Act”); although the burden shifts to the Commissioner on the fifth and final step of the sequential disability evaluation process. *See Bowen v. Yuckert*, 482 U.S. 137, 140, 146 n. 5 (1987). The Act defines disability as the “inability to engage in any substantial gainful activity” due to a physical or mental impairment “which can be expected to result in death or which has lasted, or can be expected to last for a continuous period of not less than twelve months.” 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). A claimant is disabled pursuant to the Act only if claimant’s impairment(s) are of such severity that claimant is unable to do previous work, and cannot, considering the claimant’s age, education, and work experience, engage in any other substantial gainful activity existing in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B); *see also Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir. 1999).

Pursuant to 42 U.S.C. § 405(g), this Court may set aside the Commissioner's denial of social security benefits if the ALJ's findings are based on legal error or not supported by substantial evidence in the record as a whole. *Bayliss v. Barnhart*, 427 F.3d 1211, 1214 n.1 (9th Cir. 2005) (*citing Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir. 1999)). “Substantial evidence” is more than a scintilla, less than a preponderance, and is such ““relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”” *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989) (*quoting Davis v. Heckler*, 868 F.2d 323, 325-26 (9th Cir. 1989)). Regarding the question of whether or not

1 substantial evidence supports the findings by the ALJ, the Court should “review the
2 administrative record as a whole, weighing both the evidence that supports and that
3 which detracts from the ALJ’s conclusion.” *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
4 Cir. 1995) (citing *Magallanes, supra*, 881 F.2d at 750).

5 In addition, the Court must independently determine whether or not “the
6 Commissioner’s decision is (1) free of legal error and (2) is supported by substantial
7 evidence.” *See Bruce v. Astrue*, 557 F.3d 1113, 1115 (9th Cir. 2006) (citing *Moore v.*
8 *Comm’r of the Soc. Sec. Admin.*, 278 F.3d 920, 924 (9th Cir. 2002) (collecting cases));
9 *Smolen v. Chater*, 80 F.3d 1273, 1279 (9th Cir. 1996) (citing *Stone v. Heckler*, 761 F.2d
10 530, 532 (9th Cir. 1985)). According to the Ninth Circuit, “[l]ong-standing principles of
11 administrative law require us to review the ALJ’s decision based on the reasoning and
12 actual findings offered by the ALJ - - not *post hoc* rationalizations that attempt to intuit
13 what the adjudicator may have been thinking.” *Bray v. Comm’r of SSA*, 554 F.3d 1219,
14 1225-26 (9th Cir. 2009) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) (other
15 citation omitted)); *see also Molina v. Astrue*, 674 F.3d 1104, 1121 (9th Cir. 2012) (“we
16 may not uphold an agency’s decision on a ground not actually relied on by the agency”)
17 (citing *Chenery Corp, supra*, 332 U.S. at 196). In the context of social security appeals,
18 legal errors committed by the ALJ may be considered harmless where the error is
19 irrelevant to the ultimate disability conclusion when considering the record as a whole.
20 *Molina, supra*, 674 F.3d at 1117-1122; *see also* 28 U.S.C. § 2111; *Shinsheki v. Sanders*,
21 556 U.S. 396, 407 (2009).
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DISCUSSION

(1) Whether or not the ALJ properly evaluated the medical source opinions.

The ALJ must provide “clear and convincing” reasons for rejecting the uncontradicted opinion of either a treating or examining physician or psychologist. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988); *Pitzer v. Sullivan*, 908 F.2d 502, 506 (9th Cir. 1990)). Even if a treating or examining physician’s opinion is contradicted, that opinion can be rejected only “for specific and legitimate reasons that are supported by substantial evidence in the record.” *Lester, supra*, 81 F.3d at 830-31 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995); *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)). The ALJ can accomplish this by “setting out a detailed and thorough summary of the facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.” *Reddick v. Chater*, 157 F.3d 715, 725 (9th Cir. 1998) (citing *Magallanes v. Bowen*, 881 F.2d 747, 751 (9th Cir. 1989)).

In addition, the ALJ must explain why his own interpretations, rather than those of the doctors, are correct. *Reddick, supra*, 157 F.3d at 725 (citing *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir. 1988)). But, the Commissioner “may not reject ‘significant probative evidence’ without explanation.” *Flores v. Shalala*, 49 F.3d 562, 570-71 (9th Cir. 1995) (quoting *Vincent v. Heckler*, 739 F.2d 1393, 1395 (9th Cir. 1984) (quoting *Cotter v. Harris*, 642 F.2d 700, 706-07 (3rd Cir. 1981))). The “ALJ’s written decision must state reasons for disregarding [such] evidence.” *Flores, supra*, 49 F.3d at 571.

1 a. Dr. Michael K. Friedman, D.O., examining doctor, November 19, 2004 (Tr. 364-
2 65)

3 Plaintiff contends that the ALJ failed to evaluate properly Dr. Friedman's opinion.
4 The ALJ's rejected Dr. Friedman's opinion that plaintiff could not work on the basis that
5 he expressed this opinion using workers' compensation terminology, rather than
6 terminology used in the social security regulations. Plaintiff claims that this is not
7 legitimate as the "ALJ must consider the terms of art in other programs, such as workers'
8 compensation" (*see* Opening Brief, ECF No. 17, pp. 5-6 (*citing Desrosiers v. Sec. H.H.S.*,
9 846 F.2d 573, 576 (9th Cir. 1988)); *see also* Tr. 365).

10 Defendant contends that "Dr. Friedman merely expressed an opinion that Plaintiff
11 was unable to work" (*see* Response, ECF No. 18, p. 6 (*citing* Tr. 365)). According to
12 defendant, "[t]his is not a case of a physician providing actual functional limitations that
13 an ALJ declined to consider" (*see id.* at pp. 6-7 (citation omitted)). As characterized by
14 defendant, "Dr. Friedman's opinion that Plaintiff cannot work is immaterial" (*see id.* at p.
15 7). For the reasons stated below, the Court does not agree with defendant's
16 characterization of Dr. Friedman's opinion.
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18 Dr. Friedman examined plaintiff in November, 2004 (*see* Tr. 359-66). He
19 performed a mental status examination ("MSE") (*see* Tr. 364). For example, Dr.
20 Friedman observed that plaintiff appeared "significantly depressed," that he demonstrated
21 a flat affect, and that plaintiff came "across as if he was in somewhat of a daze" (*see id.*).
22 Dr. Friedman assessed that plaintiff was "remarkably somatically preoccupied," and was
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1 “distracted” (*see id.*). Dr. Friedman assessed plaintiff’s insight as “fair to poor,” and his
2 judgment as “fair” (*see id.*).

3 Among other diagnoses, Dr. Friedman diagnosed plaintiff with “1) Pain disorder
4 with psychological features and a medical condition; 2) major depressive episode,
5 chronic and severe; [and] [t]he patient demonstrates some maladaptive traits” (*see id.*).
6 He assessed that plaintiff’s global assessment of functioning (“GAF”) was 50 to 55 (*see*
7 *id.*).

8 Dr. Friedman indicated his opinion that plaintiff’s condition was not fixed and
9 stable (*see* Tr. 365). When asked whether or not, on a psychiatric basis, plaintiff was
10 capable of gainful employment, Dr. Friedman opined as follows:
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12 I do not agree that from a psychiatric basis he is capable of gainful
13 employment. This patient is markedly preoccupied with his pain. He
14 cannot concentrate and appears to be apathetic and poorly motivated. He
15 has chronic passive suicidal ideation. He is sleep deprived. His
16 restrictions are related to multifactorial causes. The patient has had
17 preexisting psychologic problems, which have worsened following his
18 injury.

19 (*Id.*).

20 Although defendant contends that “[t]his is not a case of a physician providing
21 actual functional limitations that an ALJ declined to consider”, the Court does not agree
22 with this contention (Response, ECF No. 18, pp. 6-7 (citation omitted)). Here, not only
23 did Dr. Friedman indicate his ultimate conclusion that plaintiff could not work, which is
24 the ultimate conclusion reserved to the Acting Commissioner, but also, Dr. Friedman
specified particular functional limitations as the basis for his assessment: Dr. Friedman
opined specifically in support of his assessment that plaintiff cannot work with his

1 opinion that plaintiff is “markedly preoccupied with his pain;” and importantly, he opined
2 that plaintiff “cannot concentrate” (Tr. 365). A fair reading of this paragraph is that
3 plaintiff suffers from at least marked limitation in his ability to concentrate.

4 The implied finding by the ALJ that Dr. Friedman did not opine any specific
5 functional limitations relevant to plaintiff’s ability to work is not based on substantial
6 evidence in the record as a whole. The ALJ did not include Dr. Friedman’s opinions into
7 his determination regarding plaintiff’s residual functional capacity (“RFC”) (*see* Tr. 33,
8 39). Although the ALJ limited plaintiff to “simple repetitive tasks,” there is no indication
9 of accommodation for lapses in concentration or times off task due to concentration
10 difficulties (Tr. 33). This is error, as according to Social Security Ruling (“SSR”) 96-8p,
11 a residual functional capacity assessment by the ALJ “must always consider and address
12 medical source opinions. If the RFC assessment conflicts with an opinion from a medical
13 source, the adjudicator must explain why the opinion was not adopted.” *See* SSR 96-8p,
14 1996 SSR LEXIS 5 at *20.

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16 If Dr. Friedman’s opinion was inadequate to determine the extent of plaintiff’s
17 limitations with respect to concentration, the ALJ should have complied with his duty to
18 develop the record, not ignore specific limitations obviously opined to be of marked
19 severity (*see* Tr. 365). *See Mayes v. Massanari*, 276 F.3d 453, 459-60 (9th Cir. 2001). In
20 addition, even if the ALJ is not bound by Dr. Friedman’s opinion that plaintiff could not
21 work, the whole opinion nevertheless is probative, and in this particular instance,
22 demonstrates the level of severity in limitation regarding concentration (*see id.*; Opening
23 Brief, ECF No. 17, p. 6; *see also* Reply, ECF No. 19, p. 2 (“Defendant has not responded
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1 to Plaintiff's argument that that Ninth Circuit requires the ALJ to use terms of art of other
2 programs to interpret medical findings")). *See also Desrosiers, supra*, 846 F.2d at 576.

3 For this reason, and based on the relevant record, the Court concludes that the ALJ
4 erred in his assessment of the medical opinion evidence provided by Dr. Friedman. The
5 Court also concludes that this error is not harmless error.

6 The Ninth Circuit has "recognized that harmless error principles apply in the
7 Social Security Act context." *Molina v. Astrue*, 674 F.3d 1104, 1115 (9th Cir. 2012)
8 (citing *Stout v. Commissioner, Social Security Administration*, 454 F.3d 1050, 1054 (9th
9 Cir. 2006) (collecting cases)). The court also noted that the Ninth Circuit has "adhered to
10 the general principle that an ALJ's error is harmless where it is 'inconsequential to the
11 ultimate nondisability determination.'" *Id.* (quoting *Carmickle v. Comm'r Soc. Sec.*
12 *Admin.*, 533 F.3d 1155, 1162 (9th Cir. 2008)) (other citations omitted).

14 Defendant's argument regarding harmless error demonstrates only that Dr.
15 Friedman's opinion was contradicted. Here, failure to credit fully the opinion from Dr.
16 Friedman is not irrelevant to the ultimate determination regarding non-disability and
17 therefore is not harmless error. *See id.* at 1115. Dr. Friedman clearly opined that plaintiff
18 suffered from particular functional limitations related to his preoccupation with his pain
19 and his impairment of "pain disorder with psychological features and a medical
20 condition:" specifically, that plaintiff suffered from limitation in his ability to concentrate
21 (see Tr. 364). A review of the relevant record from Dr. Friedman indicates that Dr.
22 Friedman opined that plaintiff's limitation in this area was of sufficient severity to render
23 him incapable of working.
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1 Therefore, failure to credit the opinion fully or provide specific and legitimate
2 reasons to discount the opinion is legal error requiring reversal.

3 For the reasons stated and based on the relevant record, the Court concludes that
4 this matter should be reversed and remanded for further consideration of the medical
5 evidence provided by Dr. Friedman.

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7 b. Dr. Jennifer J. James, M.D., examining doctor, March 6, 2007 (Tr. 367-74)

8 The ALJ gave “little weight” to the opinion of Dr. James, who examined plaintiff
9 and provided her medical opinion (*see* Tr. 35, 41 (*citing* Exhibit 2F/17, *i.e.*, Tr. 374)). Dr.
10 James observed on examination that plaintiff presented with “severe cervical neuropathic
11 pain in a cape-like distribution [] common with cervical anterior spinal cord
12 encroachment [as] often seen in individuals with central spinal cord stenosis from
13 structures bruising the spinal cord” (*see* Tr. 374). Among other opinions, Dr. James
14 opined that plaintiff was not capable of employment at that time; opined that she could
15 not determine specific permanent functional limitations because he had yet to become
16 fixed and stable; and she recommended that “he have treatment with a neurologist or
17 physiatrist accustomed to treating individual with spinal cord injury” (*see* Tr. 373-74).

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19 The Court notes plaintiff’s argument that the ALJ committed harmful error by
20 incorrectly referencing the wrong date, and plaintiff’s reply that defendant “ignored this
21 glaring date error” (*see* Reply, ECF No. 19, p. 5).

22 The ALJ demonstrates confusion regarding the record, as he indicated that in
23 “March of 2007 the claimant presented to Jennifer James, M.D., for an independent
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1 medical examination” (Tr. 35 (*citing* Exhibit 2F/10-18, *i.e.*, Tr. 363-75)). However,
2 subsequently in the written decision, the ALJ notes that in “March of 2003 Jennifer
3 James, M.D, an independent medical examiner, examined the claimant” (*see* Tr. 41).
4 Although defendant does not address this error, it is not harmless error. When the ALJ
5 was specifically reviewing the medical opinion evidence, the ALJ assessed the opinion of
6 Dr. James as if it was rendered in March, 2003 before plaintiff’s alleged date of disability
7 onset of September, 2003. As Dr. James actually examined plaintiff and provided her
8 examination during the relevant period of alleged disability, the Court cannot conclude
9 with confidence that the ALJ’s error did not affect the ultimate determination regarding
10 non-disability. *See Molina, supra*, 674 F.3d at 1115.
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12 For the stated reasons and based on the relevant record, the Court concludes that
13 Dr. James’ opinion should be evaluated further following remand of this matter. Because
14 of the errors in the assessment of the medical evidence provided by Drs. Friedman and
15 James, and based on the relevant record, the Court concludes that all of the medical
16 evidence should be evaluated anew following remand of this matter.
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18 **(2) Whether or not the ALJ properly found that plaintiff’s testimony and**
19 **statements were not entirely credible.**

20 The Court already has concluded that the ALJ erred in reviewing the medical
21 evidence and that this matter should be reversed and remanded for further consideration,
22 *see supra*, section 1. In addition, a determination of a claimant’s credibility relies in part
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on the assessment of the medical evidence. *See* 20 C.F.R. § 404.1529(c). Therefore, for this reason, plaintiff's credibility should be assessed anew following remand.

(3) Whether or not the ALJ's medical and credibility findings supported the ALJ's residual functional capacity (RFC) assessment and vocational analysis.

Similarly, plaintiff's RFC and the remainder of the sequential disability evaluation process should be evaluated anew, as necessary.

(4) Whether this matter should be reversed and remanded for further administrative proceedings or for a direct award of benefits

Generally when the Social Security Administration does not determine a claimant's application properly, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Benecke v. Barnhart*, 379 F.3d 587, 595 (9th Cir. 2004) (citations omitted). However, the Ninth Circuit has put forth a "test for determining when [improperly rejected] evidence should be credited and an immediate award of benefits directed." *Harman v. Apfel*, 211 F.3d 1172, 1178 (9th Cir. 2000) (*quoting Smolen v. Chater*, 80 F.3d 1273, 1292 (9th Cir. 1996)). It is appropriate when:

(1) the ALJ has failed to provide legally sufficient reasons for rejecting such evidence, (2) there are no outstanding issues that must be resolved before a determination of disability can be made, and (3) it is clear from the record that the ALJ would be required to find the claimant disabled were such evidence credited.

Harman, supra, 211 F.3d at 1178 (*quoting Smolen, supra*, 80 F.3d at 1292).

Here, outstanding issues must be resolved. *See Smolen, supra*, 80 F.3d at 1292. Furthermore, the decision whether to remand a case for additional evidence or simply to

1 award benefits is within the discretion of the court. *Swenson v. Sullivan*, 876 F.2d 683,
2 689 (9th Cir. 1989) (citing *Varney v. Secretary of HHS*, 859 F.2d 1396, 1399 (9th Cir.
3 1988)).

4 Although the ALJ failed to provide a legitimate reason to discount the opinions
5 from examining doctor, Dr. Friedman, including the opinion that plaintiff could not
6 concentrate sufficiently to work, Dr. Friedman's opinion was not un-contradicted. The
7 Court also notes that, as noted by plaintiff, at least one of the doctors who examined
8 plaintiff subsequent to his alleged period of disability (Dr. Coder) opined similarly to Dr.
9 Friedman regarding plaintiff's limitations in concentration (*see* Opening Brief, ECF No.
10 17, p. 7 (citing Tr. 40 (citing Exhibit 5F); Reply Brief, ECF No. 19, p. 4).

12 The ALJ is responsible for determining credibility and resolving ambiguities and
13 conflicts in the medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir. 1998)
14 (citing *Andrews v. Shalala*, 53 F.3d 1035, 1043 (9th Cir. 1995)). If the medical evidence
15 in the record is not conclusive, sole responsibility for resolving conflicting testimony and
16 questions of credibility lies with the ALJ. *Sample v. Schweiker*, 694 F.2d 639, 642 (9th
17 Cir. 1999) (quoting *Waters v. Gardner*, 452 F.2d 855, 858 n.7 (9th Cir. 1971) (citing
18 *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980))).

19 CONCLUSION

20 The ALJ erred in his evaluation of the medical evidence provided by Drs.
21 Friedman and James, and all of the medical evidence should be assessed anew. As a
22 result, plaintiff's credibility and allegations also should be assessed anew.
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1 Based on these reasons, and the relevant record, the undersigned recommends that
2 this matter be **REVERSED** and **REMANDED** pursuant to sentence four of 42 U.S.C. §
3 405(g) to the Commissioner for further consideration. **JUDGMENT** should be for
4 **PLAINTIFF** and the case should be closed.

5 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
6 fourteen (14) days from service of this Report to file written objections. *See also* Fed. R.
7 Civ. P. 6. Failure to file objections will result in a waiver of those objections for
8 purposes of de novo review by the district judge. *See* 28 U.S.C. § 636(b)(1)(C).
9 Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the
10 matter for consideration on March 7, 2014, as noted in the caption.
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12 Dated this 13th day of February, 2014.

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15 J. Richard Creatura
16 United States Magistrate Judge
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